IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HARVEY MACK SALES & SERVICE, INC.,	)	
	)	
Appellant, Plaintiff-Below,	)	
	)	
v.	)	C.A. No. 2003-10-483
	)	
J & R OF DELAWARE, INC.,	)	
	)	
Appellee, Defendant-Below.	)	

Submitted: February 7, 2006
Decided: March 7, 2006

Jeffrey S. Welch, Esquire
Sally E. Sobczyk, Esquire
824 Market Street, Suite 805
Wilmington, DE 19801
Attorneys for Defendant

Lauren E. Maguire, Esquire
Ashby & Geddes
222 Delaware Avenue, 7th Fl.
P.O. Box 1150
Wilmington, DE 19801
Attorney for Plaintiff

ORDER ON DEFENDANT'S MOTION FOR LEAVE TO AMEND ITS ANSWER AND COUNTERCLAIM TO THE COMPLAINT

In this proceeding J&R of Delaware, Inc. brings this motion for leave to file an amended answer and counterclaim, plaintiff Harvey Mack Sales & Service Inc. opposes the motion. After consideration of the pleadings and supplemental briefings, the court finds as follows:

NATURE AND STATE OF THE PROCEEDINGS

This is a *de novo* appeal from a decision of the Justice of the Peace Court. On October 8, 2003, Justice of the Peace Court 12 entered judgment in favor of appellant, plaintiff-below Harvey Mack Sales & Service, Inc. (hereinafter "Harvey Mack"). On October 23, 2003, Harvey Mack filed a timely appeal of that decision under 10 Del. C. § 9571. On February 13, 2004,

appellee, defendant-below J & R of Delaware, Inc. (hereinafter "J&R") filed its answer and counterclaim. On November 22, 2005, J&R filed a motion for leave to amend its answer and counterclaim. Harvey Mack responded in opposition to the motion on December 8, 2005. On January 20, 2006, the court heard oral arguments on the motion and reserved decision pending briefing by the parties on the applicability of the "mirror image rule" to the facts of the case.

FACTS

Harvey Mack filed this action on July 25, 2003 in the Justice of the Peace Court to recover for unpaid invoices in the amount of $10,974.10 for parts and services on a truck it had originally sold to J&R. After trial, on October 8, 2003, the Justice of the Peace Court awarded Harvey Mack $3,980.10 plus interest. The Order entered by the Justice of the Peace only indicates an amount but does not specifically state the basis for its award. More specifically, the Order does not indicate whether the award had taken into consideration a counterclaim filed by J&R.

On October 23, 2003, Harvey Mack filed this *de novo* appeal pursuant to 10 Del. C. § 9571. J&R filed an answer on February 13, 2004 and asserted fourteen (14) affirmative defenses and a counterclaim. Harvey Mack replied to the counterclaim on March 5, 2004. On November 22, 2005, approximately twenty-one months after filing its answer and counterclaim, J&R brings this motion for leave to amend its answer and counterclaim. J&R's amendment seeks to add an additional affirmative defense, which states; "The claims of plaintiff are barred by the 'offset' which defendant is entitled to, as partially set forth in the Counterclaim of defendant." Additionally, J&R seeks to modify its counterclaim by altering paragraph 12 of the original answer. That paragraph currently reads: "Plaintiff serviced the Truck but rejected defendant's warranty claim, refusing to honor the warranty defendant had obtained at the time of purchase of

the Truck on the grounds that defendant was using the Truck for a purpose for which it was not intended." J&R's motion seeks to change that paragraph so that it reads: "Plaintiff serviced the Truck but rejected defendant's warranty claims, *on a number of occasions*, refusing to honor the warranty defendant had obtained at the time of purchase of the Truck on the grounds that defendant was using the Truck for a purpose for which it was not intended." (emphasis added). The effect is to expand the period when the warranty provisions could be raised as a defense to any liability.

J&R's purpose in amending its answer and counterclaim is to include two additional service invoices for repairs made to the truck after the initial Justice of the Peace trial, and a third invoice for services performed by Harvey Mack, the payment of which was in dispute at the original trial. J&R ultimately is trying to include these later repairs as a basis with which to "offset" Harvey Mack's claims. The three additional invoices are in excess of $30,000.00.

DISCUSSION

I. DOES THE MIRROR IMAGE RULE PRECLUDE A PARTY FROM AMENDING ITS ANSWER AND COUNTERCLAIM TO INCLUDE FURTHER EXPENSES INCURRED BY THAT PARTY WHEN SUCH A CLAIM IS A COMPULSORY COUNTERCLAIM?

The question in this case is whether a party, in a trial *de novo* on appeal from a decision of the Justice of the Peace Court, is precluded from amending its answer and counterclaim by the mirror image rule where the claim to be asserted arises out of the same set of facts and series of transactions. In order to determine whether an amendment to an answer and counterclaim violates the mirror image rule, the Court must first determine whether the amendment is procedurally sound. If the amendment is permitted under the Court's Civil Rules, the next question is whether such an amendment impermissibly changes the cause of action so as to

preclude this Court from taking jurisdiction over such claims. For the following reasons, I find that it does not.

A party to a civil action commenced in a Justice of the Peace Court may appeal from any decision or final order to the Court of Common Pleas under 10 Del. C. § 9571(a) for a trial "de novo." However under prevailing case law, the claims below and the parties below must be identical on appeal for the Court to exercise jurisdiction. *Williams v. Singleton*, 160 A.2d 376 (Del.Supr.1960); *Ademski v. Ruth*, 229 A.2d 837 (Del.Super.1967); *State ex rel. Caulk v. Nichols*, 281 A.2d 24 (Del.Supr.1971). Appeals *de novo* are governed by Court of Common Pleas Civ. R. 72.3, which provides, in relevant part, "(c) *Jurisdiction*: an appeal to this court that fails to join the identical parties and raise the same issues that were before the court below shall result in a dismissal on jurisdictional grounds." Subsection (c) is a recent amendment in response to a Delaware Supreme Court directive to codify the mirror image rule so that litigants are on notice of the rule's restrictions and application.[1]

The mirror image rule, as it has become known, was first announced by the Superior Court in 1857, in the case of *McDowell v. Simpson,* 1 Houst. 467 (Del.Super.1857). The Court held that "[i]f the declaration in appeal from a justice of the peace fails to correspond with the transcript of the suit below, *in the names and number of the parties, the character or right in which they sue, or in the cause or form of action*" then the appellate court cannot hear the appeal. *Id.* (emphasis added). In 1999, the Superior Court stated; "[the] rule requires a court presiding over an appeal de novo to have before it all of the parties and issues that were before the court below." *Freibott v. Patterson Schwartz, Inc.*, 740 A.2d 4 (Del.Super.1999) (citing *Cooper's Home Furnishings, Inc. v. Smith,* 250 A.2d 507, 508 (Del.Super.1969) (appeal dismissed where

[1] This rule amendment (effective Nov. 29, 2004) is promulgated pursuant to *Fossett & Stock v. DALCO Construction*, 2004 Del. Supr. LEXIS 362, C.A. No. 607, 2003 (Decided August 20, 2004)

plaintiff failed to include alleged joint-debtor in appeal); *Dzedzej v. Prusinski,* 259 A.2d 384 (Del.Super.1969) (appeal dismissed where defendant below failed to name co-defendant in appeal)). The Supreme Court of Delaware in *Fossett & Strock v. DALCO Construction*, 2004 Del. Supr. LEXIS 362, 2004 WL 1965141 at 1, recently held that the policy rationale for the mirror image rule as:

> "The rule provides for an adequate and fair hearing of the *entire* matter *de novo* by affording all parties to the Justice of the Peace proceeding an opportunity to argue their version of the facts, to present their view of the law's application to those facts, and to assure the *de novo* reviewing court that all relevant issues that could be presented can be heard. The rule also spares a Judge hearing an appeal *de novo* from having to consider assertions about facts and law attributable to a party below who or which was not made a party to the *de novo* appeal. Lastly, the mirror image rule arguably avoids difficulties that might arise in joining unnamed parties after the expiration of the fifteen-day jurisdictional limit for an appeal from Justice of the Peace Court."

Subsequently, in *Pavetto v. Hansen,* 2004 Del.Super., LEXIS 349, the Superior Court reversed a dismissal by the Court of Common Pleas based upon application of the mirror image rule. The Superior Court held that the mirror image rule does not automatically strip a Court of subject matter jurisdiction. *Id.* The Court, relying upon *Fossett v. DALCO*, went on to say that, absent good reason, such as actual or potential prejudice as a result of noncompliance, the mirror image rule should not be applied to preclude a Court of competent jurisdiction from properly exercising subject matter jurisdiction. *Pavetto v. Hansen, at 5, 6.* The Superior Court reasoned that Judges should look to the facts of each case to determine whether dismissal is warranted. However, Court of Common Pleas Civil Rule 72.3(c) was added after this case, therefore, the analysis requires the Court to consider the language of Rule 72.3(c) with the application of *Fosset* and *Pavetto* to these proceedings.

Additionally, such decisions and Civil Rule 72.3(c) must be considered with Civil Rule 13 which provides, in relevant part, "(e) *Counterclaim maturing or acquired after pleading.* A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the Court, be presented as a counterclaim by supplemental pleading." Amended and Supplemental pleadings are governed by Civil Rule 15, which provides in subsection (a), that a party may amend its pleadings by leave of court "and leave shall be freely given when justice so requires." Subsection (d), in part provides, "Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." The impact of the rules governing amendments is to ensure that all actions arising out of the same set of relevant facts are considered and decided in a single proceeding.

J&R seeks to include invoices for parts and service performed on the truck which is the subject of the original litigation. Two of the three separate invoices arose after the trial below; one from Johnson & Towers, Inc. dated February 15, 2005 and the other from Allentown Truck Sales dated August 13, 2004[2]. If J&R had these invoices at the time of trial in the Justice of the Peace Court, it would have been required to bring the claim as an offset in its counterclaim because they arose out of the same set of transactions or occurrences. Thus, it would not be logical not to include them in these proceedings. If I were to conclude otherwise, such claims would have to be litigated in a separate action which would be based upon many, if not all, of the documents in this case and involve the same witnesses.

[2] See defendant J&R of Delaware, Inc.'s Supplemental Memorandum of Law in Support of its Motion for Leave of the Court to File an Amended Answer and Counterclaim Ex. C and D.

The mirror image rule requires the same parties and cause of action on appeal that were in the action below. The parties are the same; however, Harvey Mack contends the inclusion of costs incurred by J&R after trial in the Justice of the Peace Court impermissibly changes the issues and the cause of action on appeal. The Court disagrees. If this Court were to interpret the mirror image rule so narrowly as to preclude J&R from including additional expenses incurred in the ongoing repair of its truck, it would defeat the basis of modern day pleading practices. The scope of the rules set forth in Court of Common Pleas Civil Rule 1 provides that the rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. This policy requires all claims arising out of the same set of facts to be resolved in one action. Furthermore, the costs J&R seeks to "offset" against Harvey Mack's claims do not alter the underlying cause of action in this case. The mirror image rule which bars a party from raising additional claims on appeal, can only logically apply to new unrelated claims if all of the rules are read together. Moreover, to conclude otherwise would cause the Court to ignore application of compulsory counterclaims which requires all claims arising out of the same set of facts to be brought or forever lost. Accordingly, J&R's motion to amend its answer and counterclaim is GRANTED.

SO ORDERED this 7th day of March, 2006

_____

Alex J. Smalls
Chief Judge

Mack-OP Mar 06